

STATE OF OKLAHOMA, *et al.*,)
)
Plaintiffs,)
)
 v.) **Case No. 4:05-cv-00329-GKF-SAJ**
)
 TYSON FOODS, INC., *et al.*,)
)
Defendants.)

Reports of Wayne Grip and Michael McGuire:	December 15, 2008
Report of Victor Bierman:	January 5, 2009

¹ This motion is filed on behalf of all Defendants except the Cargill Defendants.

Reports of Timothy Sullivan
and Alex Horne:

February 5, 2009

Report of aquatic ecologists
(James Chadwick and
supporting experts):

May 30, 2009

This extension would not alter the other deadlines in the Court's scheduling order. Plaintiffs have advised that they oppose the requested extension.

Defendants' experts need additional time to complete their reports for five related reasons: (1) Plaintiffs' experts have worked on their reports for more than three years, but only within the last two weeks have they revealed the full scope of their work to Defendants' experts; (2) Defendants' experts have worked diligently in anticipation of Plaintiffs' expert reports, but review of Plaintiffs' expert reports makes clear that much of the work to analyze and rebut Plaintiffs' expert case could not have been undertaken earlier; (3) Plaintiffs have failed to timely produce all of the materials relating to their expert reports. Rather, to this day Plaintiffs continue to trickle out essential expert materials; (4) Plaintiffs have repeatedly delayed their production of data in violation of this Court's orders. Some of these delays have withheld data from the defendants for many months. Plaintiffs are still withholding some key data. Plaintiffs' delays have slowed the process of analyzing and responding to Plaintiffs' claims; and (5) Plaintiffs have identified 18 retained testifying experts and 33 non-retained testifying experts for their case. These experts cannot reasonably be deposed in time for the defense experts to make appropriate use of the resulting information before August.

The facts and arguments relating to each of these points are discussed more fully below.

1. Defendants Have Been Prejudiced By The Disparity In Time Allocated To Each Side's Experts

Plaintiffs filed this lawsuit in June 2005, nearly three years ago. Plaintiffs' counsel conceived of this lawsuit and put their experts to work developing its scientific theories well before then. *See, e.g.*, Ex. 1 (status report from CDM and Lithochimeia dated April 9, 2005); Ex. 2 (Lawrence Depo. 172:1-10 (State took soil samples as early as 2003)); Ex. 3 (Fisher Depo. 36:9-15 (Dr. Fisher retained in late 2004)); Ex. 4 (Teaf Depo. 63:17-18 (Dr. Teaf began working on case in August 2004)); Ex. 5 (Harwood Depo. 16:8-13 (Prof. Harwood retained in Summer 2004)).

Since filing suit, Plaintiffs have repeatedly sought to extend the time available to them to develop their scientific theories. Under the Court's first scheduling Order, Plaintiffs' expert reports were due on December 3, 2007. Dkt. #1075. Then, in October 2007, Plaintiffs sought an eight-month across-the-board extension, which would have resulted in their initial expert reports being due on August 4, 2008. Dkt. #1322. The Court granted that request in part, issuing an Amended Scheduling Order under which Plaintiffs' expert reports were due April 1, 2008. Dkt. #1376. Then in March 2008, Plaintiffs filed yet another motion to delay the production of their expert reports, this time seeking a further four-month extension in the production of each of their expert reports. Dkt. #1618. The Court granted this motion in part, giving Plaintiffs until May 15, 2008 to complete their expert reports. Finally, on the eve of that deadline, Plaintiffs requested further extensions for several of their experts, seeking an additional two weeks for the production of Dr. Wells' and Drs. Cooke and Welch's reports, and an additional one week for the production of Drs. Engel's, Harwood's, and Stevenson's reports. Dkt. #1702. The Court granted these requests. Dkt. 1706. Thus, Plaintiffs have had well over three years to craft their expert theories, including nearly six months gained through motions for extensions.

2. Defendants Have Worked Diligently To Prepare For Plaintiffs' Expert Reports

Throughout this litigation, Plaintiffs have repeatedly refused to reveal details of their expert work to allow Defendants to begin analyzing their specific claims. In response to dozens of discovery requests and communications, Plaintiffs have provided only broad generalities about their expert case while emphasizing they were entitled to keep the details of their expert work secret until the deadline for production of their expert reports. A few examples of such communications and discovery responses are attached as Exhibit 6.

Despite Plaintiffs' repeated refusal to reveal the specific subjects of their expert work, Defendants have not wasted time. Rather, Defendants have attempted to surmise as much as possible about Plaintiffs' potential claims and have retained some of the nation's leading experts in the relevant fields. As demonstrated by the testimony presented at the hearing on Plaintiffs' motion for a preliminary injunction, Defendants' experts have worked diligently while the case has been pending.

However, the secrecy Plaintiffs enforced for these past three years has had the intended result. As noted in the attached declarations, Defendants and their experts were unable to anticipate all of the specifics of Plaintiffs' expert claims. *See* Exhs 7-12. Accordingly, the defense experts now need time to analyze the information Plaintiffs refused to provide previously and to prepare responses.

The volume of Plaintiffs' expert submissions also creates an obstacle for the defense experts. Plaintiffs have produced reports from 16 expert witnesses. On May 15, Plaintiffs produced the expert reports of Darren Brown, Lowell Caneday, Berton Fisher, Gordon Johnson,

Todd King, Robert Lawrence, Roger Olsen, Megan Smith, Robert Taylor, and Chris Teaf.² A week later, Plaintiffs produced expert reports for Bernard Engel, Valerie Harwood, Jan Stevenson, and a week after that reports for Dennis Cooke, Eugene Welch, and Scott Wells. Plaintiffs' reports cover a host of subjects including recreational use of the watershed, lake and river modeling, geology and hydrogeology, agronomics, agricultural economics, microbial source tracking, statistical analyses, risk assessment, toxicology, and remediation methods. These expert reports and their accompanying appendices, charts, maps, and tables are collectively several thousand pages long. But these expert reports are just the beginning. On May 14, Plaintiffs produced a hard drive of "considered materials" associated with their expert reports consisting of over 690 gigabytes of data—an enormous amount of information. *See* Ex. 13, Declaration of Nicole Longwell ¶¶ 1-8. As discussed below, since the May 14 deadline for production of expert materials, Plaintiffs have continued to produce expert-considered materials on a rolling basis. Plaintiffs have produced over 13 additional gigabytes of material since the May 14 deadline passed. *Id.* Defendants have not been able to review all of this material to date.

As an example of the volume of this material, it takes more than 12 hours for a computer to make a single electronic copy of the materials produced by one of Plaintiffs' experts, Bert Fisher. *Id.* Plaintiffs produced nearly 800,000 separate electronic files with their expert materials. *Id.* Based on defense counsel's experience with electronic discovery, we believe these electronic files will likely contain at least one million pages of material when printed. It has taken weeks just for Defendants to sort out this material and provide it to their experts. *Id.*

² Plaintiffs had previously informed Defendants that they would also be providing Rule 26 disclosures for Jim Loftis and Berry Winn, but neither of these individuals have yet provided an expert report.

Defendants' experts need to review and analyze all of this material in order to be prepared to explain it to the Court in a clear and logical manner.

3. Before The Recent Production, Defendants' Expert Work Was Already Hampered By Plaintiffs' Repeated Withholding Of Data And Documents

While using every possible day to develop their own case, Plaintiffs have frustrated Defendants' attempts to discover the data and other facts underlying Plaintiffs' case. Following Plaintiffs' failure to comply voluntarily with reasonable discovery requests, Defendants were first forced to move to compel the production of testing and sampling data and results more than two years ago in May 2006. *See* Dkt. #743. The Court granted that motion in January 2007, ordering the Plaintiffs to produce to Defendants all "requested data, testing, sampling and results." Dkt. #1016. Despite that unambiguous directive, Defendants found themselves over a year later in February 2008 having to move to compel compliance with the Court's January 2007 order. Dkt. #1605. Plaintiffs' delays culminated in the Court's May 20, 2008 Order sanctioning Plaintiffs for discovery delays and violations. Dkt. #1710. The Court found that indeed "production of [plaintiffs'] data was improperly delayed" by as much as 8 months. *Id.* at 3. Moreover, the Court found that new data, including "field books, synoptic samplings and approximately one-half of the macroalgae and macroinvertebrate data" was not produced until after Defendants filed their February 2008 motion to compel compliance with the Court's January 2007 production order. *Id.* at 4. Accordingly, the Court ordered Plaintiffs to produce future data within 10 days of generation, and imposed sanctions for Plaintiffs' prior conduct. *Id.* at 6.

As noted in the attached declarations, Defendants and their experts have not yet been able to complete a review and analysis of Plaintiffs' voluminous late-disclosed data. *See* Exs. 7-12. Rather, Plaintiffs' persistent failure during the entire course of this litigation to produce their data

until compelled by the Court to do so has greatly slowed Defendants' efforts to hire the correct experts and prepare a well-reasoned analysis of Plaintiffs' data.

Moreover, Defendants recently learned that, even following the Court's sanctions Order, Plaintiffs continue to withhold data from Defendants. In Rule 30(b)(6) depositions of Oklahoma state officials taken on May 27 and 30, the State's witnesses revealed that the Oklahoma Department of Environmental Quality maintains databases of septic systems, sewage overflows, and environmental complaints – databases that Plaintiffs have never produced despite numerous discovery requests. *See* Longwell Decl., Ex. 13, ¶¶9-12 & Exs. B-H. Obviously, Defendants have not even begun to review those these databases, and do not yet know what time and resources it will take for experts to analyze them.

Finally, the defense experts do not yet have the benefit of the numerous documents which Magistrate Judge Joyner ordered produced, but which Plaintiffs are withholding while they appeal that order. In response to a motion to compel, Judge Joyner ordered Plaintiffs to produce a revised privilege log to support their claims of privilege and to produce a number of documents on which Plaintiffs had claimed privilege. Dkt. #1463. Judge Joyner denied Plaintiffs' motion for reconsideration, Dkt. # 1629 and Plaintiffs appealed, Dkt. #1659. The Court granted Plaintiffs' motion to stay the production of these documents while the appeal is pending. Dkt. # 1664. The extension Defendants request herein will provide additional time for the Court to resolve Plaintiffs' objection and will potentially provide Defendants with numerous relevant documents that Plaintiffs have withheld since the start of this case.

4. Plaintiffs Have Delayed Producing Some Of The Most Critical Information Related To Their Expert Reports

As noted, the majority of Plaintiffs' expert reports were due on May 15, 2008, Dkt. # 1658, and should have been accompanied by each expert's "considered materials." Fed. R. Civ.

Pro. 26(a)(2)(B)(ii). As detailed in the accompanying declarations of Leslie Southerland and Nicole Longwell, Exs. 13-14, Plaintiffs produced their expert reports and their accompanying considered materials in a disorganized and confusing manner. Plaintiffs intermixed charts, correspondence, and data in electronic folders. Some electronic files could not be opened. Some expert reports were missing pages. Defendants are still working to organize and make sense of Plaintiffs' expert production. *See* Ex. 13, ¶¶1-8.

Plaintiffs' production was also incomplete. Since May 15, Plaintiffs have continued to produce additional considered materials on a haphazard basis. For example, on May 28, Claire Xidis wrote to Leslie Southerland explaining that it had not been "logistically possible" for Plaintiffs to produce all considered materials by the deadline. Ex. 15. Accordingly, Ms. Xidis noted that additional expert materials would be forthcoming at some point in the future. *Id.* Plaintiffs have produced additional expert materials several times per week since the deadline passed, and are continuing to trickle out new expert information to Defendants. Examples of Plaintiffs' numerous post-deadline expert productions are attached as Exhibits 15 and 16.

The late-produced expert materials have included some of the most important information underlying Plaintiffs' expert case. For example, Roger Olsen's report notes that two electronic files were particularly critical to his analysis. *See* Olsen Report at 6-35, 6-39. But Plaintiffs did not produce those files with their expert reports on May 15. Rather, only after Defendants inquired about the missing documents did Plaintiffs finally produce the files two weeks later on May 30.

5. Defendants Cannot Reasonably Depose The Large Number Of Experts Identified By Plaintiffs In Time To Make Appropriate Use Of The Information

Plaintiffs have identified 18 retained experts and 33 non-retained experts on whom their scientific case rests. *See* Ex. 17 (letter from Louis Bullock). Magistrate Judge Joyner has

encouraged the parties to coordinate on a plan for taking expert and fact depositions in this case. Defendants have approached Plaintiffs and requested cooperation in preparing such a plan. In response to Defendants' request, Plaintiffs provided dates when their retained experts can be deposed. *See* Ex. 18 (email from David Page). Plaintiffs' proposed schedule demonstrates the problem.

Under Plaintiffs' proposed schedule, the depositions of Plaintiffs' retained experts would begin on June 18 and would continue until August 28. *Id.* Even with multiple expert depositions per week, this would give Defendants' experts only a few days to make appropriate use of the information obtained in many of the depositions before their responding reports are due. Because of the large number of depositions, Plaintiffs have scheduled some of the expert depositions for the very day that the response to that expert is due. *See id.* Plaintiffs' counsel have stated that there can be "very little adjustment in the proposed dates" they have dictated for these depositions and that the 33 depositions of Plaintiffs' non-retained testifying experts will need to be scheduled on top of these dates. *See* Ex. 19 (email from Robert Nance). Additionally, Defendants' expert Michael McGuire has indicated that he may need Defendants to depose several individuals who operate water treatment plants within the Illinois River Watershed. *See* Ex. 9. The depositions of the State's 33 non-retained experts and Dr. McGuire's requested depositions would need to occur with sufficient time for the defense experts to make use of the information obtained before the deadline for submitting expert reports. *Id.*

Moreover, while Plaintiffs' proposed schedule demonstrates that the depositions of Plaintiffs' experts cannot be taken within the current timeframe even if the parties begin immediately, it is unreasonable to believe that depositions could begin within the next few weeks. Plaintiffs' proposal to start depositions next week is untenable because it ignores the

facts discussed above about the massive volume of Plaintiffs' expert production and the disorganized and continuing nature of that production. Defendants have spent weeks simply sorting out what Plaintiffs have produced (and continue to produce). *See* Exs. 13-16. Now the defense experts need to analyze that information before they can assist counsel in taking a meaningful deposition.

6. Good Cause Exists To Grant An Extension

A scheduling order may be changed "for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). For the foregoing reasons, Defendants respectfully submit that there are a number of overlapping good causes for extending the deadline for defense expert reports.

A. General Extension

Defendants respectfully move the Court for a general extension of just two months. Under this extension, all Defense expert reports on issues of liability will be due October 15, 2008, with the few individual exceptions discussed below. Defendants make this request in view of the scope of Plaintiffs' experts' reports and the burdensome task of responding to them. Responding to each of these reports individually requires substantial effort. Each expert's report and considered materials must be reviewed, a deposition must be prepared for and taken, and then a responsive report must be prepared. This would be a monumental task even putting aside Plaintiffs' late and ongoing production of data and experts' considered materials. As Plaintiffs' proposed deposition schedule shows, it is not possible for the parties to even take the depositions of Plaintiffs' retained experts within the current timeframe and still leave sufficient time to make use of the information from the deposition. *See* Ex. 18.

While responding to each report individually would be challenging, addressing them all at the same time poses a burden of a substantially greater magnitude. Plaintiffs' experts frequently cite one another and rely on each others' work, and multiple experts cover similar or

congruent subject matter. Therefore, Defendants must do more than simply retain a single expert to respond to each of Plaintiffs' experts. Rather, to respond comprehensively, reports, considered materials, and depositions must be cross-referenced and coordinated. Thus, for example, the fact that Plaintiffs refuse to allow three of their retained experts to be deposed until after August 15 is a problem for all of the defense experts who must submit a report on August 15. *See id.*

With an additional two months, the depositions of Plaintiffs' testifying experts could be completed by mid-September, leaving only one month for the defense experts to respond to the information obtained in those depositions. This is an aggressive plan, which will require Plaintiffs' cooperation on the scheduling of the more than 50 depositions associated with their list of retained and non-retained testifying witnesses.

Defendants request a general extension of two months fully recognizing that unfolding events may change their experts' needs and timelines. To note just a few examples, unavoidable conflicts or unforeseeable events may delay needed depositions, Plaintiffs may continue to reveal additional unexpected data or reliance materials, or expert depositions may reveal different or additional opinions that Defendants must address. Notwithstanding these possibilities, Defendants have taken a conservative approach to this motion and have requested longer extensions *only* for those experts whose need for greater time is clear now. If circumstances create any need for additional time by any other defense expert, Defendants will of course consult with Plaintiffs' attorneys to try to reach agreement.

B. Expert-Specific Extensions

In addition to the general two-month extension requested above, a few of Defendants' experts require additional time to complete their work.

1. Dr. Michael McGuire

Several of Plaintiffs' expert reports make claims about the quality of the drinking water in the IRW, and assert that drastic measures must be taken to alter the process for treating that water. *See, e.g.*, Teaf Report at 22-29; King Report at 29, 31. Defendants have retained Dr. Michael McGuire, an expert with 30 years of experience in drinking water quality and water processing issues. Dr. McGuire is surprised by Plaintiffs' claims, and states that "it appears that the Plaintiffs intend on advancing a number of claims that are not well supported by existing science. These claims are novel and unexpected and thus will require particular scrutiny." Ex. 9 ¶ 5.

In order to respond to these unexpected claims it will be necessary to gather and analyze a substantial volume of data. First, I will have to analyze reports and other records from the various water processing facilities within the Illinois River Watershed, of which there are a large number. Each of these plants is required to issue periodic reports addressing water quality issues, and also to keep certain records. While the materials provided by the Plaintiffs appear to contain some of these reports and records, it is unclear to me at present whether they have all been gathered and produced as part of the discovery in this case.

Id. ¶ 5. Additionally, Dr. McGuire notes that much of the relevant information at the water treatment facilities is informal or unwritten, and therefore Defendants may need to take depositions at the water treatment facilities in the IRW. *Id.* ¶ 7. According to Plaintiffs' experts, there are more than 10 such facilities.

Dr. McGuire believes he can accomplish his review in seven months if the parties can agree to proceed quickly with the necessary depositions and document production. *Id.* ¶ 8. Accordingly, Defendants respectfully request that the due date for Dr. McGuire's report be extended to December 15, 2008.

2. Mr. Wayne Grip

Defendants have retained Mr. Wayne Grip of Areo-Data Corp. to provide testimony regarding erosion and land use in the IRW. Defendants initially sought Mr. Grip's expertise to testify from historical topographic maps, supported by some limited historical photography of the Illinois River. Mr. Grip began that work prior to production of Plaintiffs' expert reports.

However, Plaintiffs' recent expert reports have surprisingly denied the role that erosion plays in creating the harms they allege. In view of the testimony offered in Plaintiffs' expert reports, it is necessary to expand Mr. Grip's testimony in a manner that will require significant additional time. Specifically, Plaintiffs have put forward the unrealistic view that "bank erosion is not considered to be a substantial contributor to P loading to the rivers and streams of the IRW and Lake Tenkiller." King Report 3.2.2.2 at 15.

As Mr. Grip explains,

In order to respond to Mr. King's assertion about the level of erosion in the IRW over the past century it will be necessary to undertake a more detailed analysis of riverbank and river course movement and land-use changes along the rivers than previously planned. In many parts of the country, historical high-altitude photographs are relatively widely available. This has proved not to be the case in the IRW. It will therefore be necessary to secure hundreds of photographic plates taken in the 1940s at a much lower altitude documenting the course of and land use alongside the river. These plates are held primarily by the National Archives and the United States Geological Survey. Securing materials from the National Archives and the USGS is a time-consuming process. In my experience, these agencies take approximately four to five months to respond to requests for historical photographic plates of large areas. For an order of this size, it is likely that they would have to send the plates out to a contractor for printing, which will further delay their production.

Ex. 8 ¶ 6. Once the photographs have been obtained, Mr. Grip must process them in a digital stereoplotter, correlate them to existing coordinates on current-day maps, and interpret the results. *Id.* ¶ 7-8. Based on Mr. Grip's decades of experience, and "assuming diligent efforts on

my part and assuming timely production by the agencies,” Mr. Grip believes he “can complete [his] analysis in approximately seven months, with the potential of concluding sooner if the historical images can be obtained more quickly.” *Id.* ¶ 9. Therefore, Defendants request that the due date for Mr. Grip’s report be extended to December 15, 2009. Defendants will produce the report sooner if the relevant government agencies respond to Mr. Grip’s requests more quickly than anticipated.

3. Dr. Victor Bierman

Defendants have retained Dr. Victor Bierman to analyze and respond to Plaintiffs’ efforts to model the IRW. Several of Plaintiffs’ experts offer modeling testimony. For example, Dr. Bernard Engle’s report discusses a model of the entire IRW used to predict phosphorous loading, and Dr. Scott Wells appears to have developed a hydrological model of Lake Tenkiller. *See* Ex. 7 ¶¶ 11-12.

As Dr. Bierman explains in the attached declaration, it may be impossible to model a system as complex as the IRW with the necessary degree of accuracy. *Id.* ¶ 6. Such a model will have myriad assumptions and calculations hidden within the model’s computer code. Unpacking, analyzing, and critiquing even a small, straightforward model is a detailed and time-consuming process. *Id.* ¶¶ 6-14. Analyzing Plaintiffs’ models will be much more burdensome. Dr. Bierman will first have to discern how the generic model template has been modified to apply to the IRW. This will include both identifying any IRW-specific assumptions built into the model, as well as checking the coding itself for errors. *Id.* Dr. Bierman will then have to review the datasets fed into the models, which again will reflect certain assumptions and which can dramatically affect the models’ output. Finally, Dr. Bierman will have to review the datasets compiled to calibrate the models. *Id.*

To critique the model, Dr. Bierman will have to run the model in an effort to re-create Plaintiffs' results. *Id.* If he is unable to do so, he will have to determine why. Importantly, for each error or inappropriate assumption Dr. Bierman identifies in a model, he will have to re-run the model to compare its results to Plaintiffs' results and to the appropriate calibrating data. *Id.* The model will likely need to be re-run each time a questionable assumption is identified to demonstrate the effect of that assumption on the whole. *Id.* Thus, just the re-running of the model to demonstrate the effect of each assumption that is built into the model will be a months-long task. As Dr. Bierman notes,

Plaintiffs have informed the Court that Dr. Wells' model takes 4 to 7 days to run for a 50-year simulation, and an additional 2 to 5 days to analyze the results from each simulation. *See* Plaintiffs' Emergency Motion for a Brief Extension, Dkt. # 1702, at 2-3; Wells Affidavit. It therefore requires an average of 9 days to complete a single cycle of Dr. Wells' model. As noted, Dr. Engel developed at least six separate 50-year scenarios. In order to critique properly Dr. Wells' and Dr. Engel's work, it is reasonable to assume that, at the very least, Defendants will need to re-create each of those six runs with each model.

Id. ¶ 14.

In Dr. Bierman's professional judgment, it will take seven months to complete the process of assessing and reporting on Plaintiffs' models *once working copies of the Plaintiffs' models are produced to him.* *Id.* ¶ 16. This last qualifier is important because, as explained in a motion to compel filed concurrently with this motion, Plaintiffs have refused to produce working copies of their models. Rather than produce the models as they exist on the computers of Plaintiffs' experts, Plaintiffs have disassembled their models and provided the electronic components to the Defendants. Defendants have spent weeks trying to piece these parts back together, while Plaintiffs have continued to reject requests to produce the working copies.

Once Dr. Bierman can analyze Plaintiffs' models, the information he obtains will assist the Court in understanding the limitations and errors that will otherwise be hidden within these complex computer models. Defendants therefore respectfully request that the due date for Dr. Bierman's report be extended to January 5, 2009.

4. Drs. Sullivan and Horne

Defendants have retained Dr. Timothy Sullivan and Dr. Alex Horne to review and respond to Plaintiffs' testimony regarding the limnological health of the Illinois River and Lake Tenkiller, respectively. Dr. Horne is also a renowned expert in algae.

In their declarations, Drs. Sullivan and Horne explain that they have already begun the work related to their areas of expertise. *See* Exs. 11-12. Dr. Horne lays out the work ahead:

The next stage of my work will be reviewing the assumptions and sources relied on by the Plaintiffs' experts relevant to my areas of expertise. It is important to ensure that conclusions have been reached by considering the entire relevant body of learning, and not by selectively culled reports and portions of reports that favor a predetermined conclusion. I have begun this work, and will proceed diligently with doing so.

In order to respond to Plaintiffs' reports' comprehensively, it is appropriate for me to examine the waters in question in person after having reviewed Plaintiffs' experts' specific scientific assertions. When examining algae and related water quality parameters, a key time is late summer and fall, when water quality problems often reach their peak. Therefore, it would be optimal for me to be able to study the waters at issue and compare them with the assertions of Plaintiffs' experts in September and October.

Ex. 12 ¶¶ 5-6.

Dr. Sullivan has been working on the case for several years and testified at the preliminary injunction hearing on bacterial issues, but his work on the other issues discussed in Plaintiffs' expert reports has been prejudiced by Plaintiffs' failure to produce data in a timely manner:

As my testimony at the preliminary injunction hearing demonstrates, I have already begun work on this matter. I have worked diligently to understand and analyze the voluminous data available about environmental conditions in the Illinois River Watershed. However, my work has been hampered by the late and rolling production of data from the Plaintiffs. An analysis of water quality data depends on the relationship between samples taken at different times and places and under different conditions. When new data are added or missing information about the circumstances under which previous data were gathered is supplied, much work must be re-done. Thus, the fact that we have only recently received a large amount of data from the Plaintiffs is a hindrance to our progress.

Ex. 11 ¶ 6.

As Drs. Sullivan and Horne explain in their declarations, their work will depend in significant part on Dr. Bierman's review of Plaintiffs' modeling of the IRW. This is because their testimony will serve in part to explain the likely effects of comparative sources of nutrients and other inputs into the rivers, and also the effects of projected levels of inputs. While Drs. Sullivan and Horne can begin some of their work before Dr. Bierman has concluded his work, they cannot be confident of their conclusions responding to Plaintiffs' models until Dr. Bierman has fully exposed any inaccuracies in those models. As Dr. Horne states, this relationship between critiquing Plaintiffs' models and the work of the limnologists is demonstrated by Plaintiffs' recent submission to this Court.

[B]efore I can complete my work it will be necessary for me to have access to the conclusions reached by Dr. Victor Bierman during his review of Plaintiffs' computer models. These models attempt to identify the relative contributions of various constituents to the IRW and to assess their fate and transport within the system. A number of Plaintiffs' experts' conclusions appear to be based in part on the conclusions provided by Plaintiffs' models. Before I can address those conclusions, and before I can discuss with confidence the effects of the constituents addressed in Plaintiffs' models, I must first allow Dr. Bierman to complete his review of the models themselves. Plaintiffs' expert, Dr. Welch, explained this same need to the Court recently when he noted that his work "is dependent upon the results of certain environmental modeling

which is being conducted by Dr. Scott Wells.” Affidavit of Eugene B. Welch (May 11, 2008). So too is my work dependent on Dr. Bierman’s review of Dr. Well’s and Dr. Engel’s modeling work.

I will work diligently to accomplish as much as possible while Dr. Bierman is concluding his work. That way I can complete those portions of my analyses that are not dependent on understanding the intricacies of Plaintiffs’ models. In my professional experience and best judgment, assuming diligent efforts, I am confident that I can complete my work within 30 days of Dr. Bierman completing his review of Plaintiffs’ models.

Ex. 12 ¶¶ 7-8 ; *see also* Ex. 11 ¶¶ 7-10.

Accordingly, Defendants request that the due date for the reports of Drs. Sullivan and Horne be extended to February 5, 2009.

5. Aquatic ecology (Mr. James Chadwick)

Finally, Plaintiffs have submitted several expert reports that focus on the health of fish and insect populations as a measure of the health of aquatic ecosystems. *See, e.g.*, Stevenson Report; Welch/Cooke Report.

Defendants have retained a team of leading aquatic ecologists to address these issues. However, the work of this group will take a number of months for several reasons. First, much of the data which was the subject of the Court’s recent sanctions order was Plaintiffs’ data on aquatic ecosystems. Indeed, this Court found that Plaintiffs improperly withheld “field books, synoptic samplings and approximately one-half of the macroalgae and macroinvertebrate data” until after Defendants filed their February 2008 motion to compel compliance with the Court’s January 2007 production order. Dkt. #1710 at 4. Plaintiffs’ decision to hold back half of their aquatic ecology evidence has slowed Defendants’ review of Plaintiffs’ aquatic ecology work.

Moreover, Defendants’ experts have explained that this scientific subject is especially dependent on having Plaintiffs’ data as a starting point. The ecological health of the river system could be assessed at thousands of potential sites or using different measures, and the experts need

to see what their counterparts have done to respond with a meaningful comparison. Now that Defendants have access to a broader set of Plaintiffs' data, Defendants' ecologists have concluded that they may need to conduct sampling on their own, because "the sample set upon which Dr. Stevenson relies appears to be inadequate to support an analysis of this kind." Ex. 10 ¶ 7. As a scientific matter, that sampling should be taken over summer, fall, and spring because the varied life cycles of the biological markers Plaintiffs have selected may require a multi-season approach:

In order to characterize the benthic and fisheries ecology of a waterway, it is ideal to take samples during several seasons. This is because aquatic communities display a high level of seasonality. This is true as to both the particular species as well as abundances that sampling will detect.

For example, most macroinvertebrates that inhabit streams have a lifecycle during which they hatch, develop, emerge, take flight, and reproduce. Where multiple species are present, these lifecycles are not perfectly matched. Rather, they generally have developed so as to be staggered. Hence, samples taken at any given point will capture only those macroinvertebrates at a stage of development susceptible to sampling. For example, invertebrate sampling is typically conducted using a 500 micron mesh net. Only macroinvertebrates that have hatched and grown large enough to not pass through the net, yet which have not yet taken flight, will be captured. Other species either earlier or later in the developmental process will be underrepresented. Also, sampling done only during the summer may undercount whatever species are present because many species may be either in the adult flying stage or in recently-deposited egg and early instar stages. Therefore, sampling only during the next few months from now would risk undercounting the total extent of the macroinvertebrate community.

Id. ¶ 8-9.

Sampling over several seasons also helps account for the effects of high- and low-flow conditions in the rivers and streams at issue:

In addition to accurately characterizing the benthic and fisheries ecology, sampling over multiple seasons also accurately characterizes the conditions impacting the stream by accounting for both high and low flow conditions. Depending on the specific waterway, high and low flow conditions can have different effects. During low flow conditions, where water levels are at their lowest, levels of contaminants may be most concentrated and therefore overstated. Conversely, during high flow conditions, there is more water present to dilute the levels of contaminants. But, high flow conditions can also overstate contaminants by adding materials to the river that are not usually present, such as material from urban storm systems. Sampling over a longer period smoothes out these peaks and troughs. Sampling during only one season, conversely, risks misrepresenting average levels of constituents in the water.

Id. ¶10. For this reason, Defendants request sufficient time for their aquatic ecologists to sample in summer, fall, and spring. But sampling over several seasons is not the only reason for an extension. As Mr. Chadwick explains, additional time is needed to visit and assess the specific sites from which Plaintiffs drew their samples:

In addition, in order to respond to Dr. Stevenson's report it will be necessary to assess the sites from which his samples were taken. This is true for both reference and target sites. Simply put, a sample is only as good as the location from which it came.

Id. ¶11.

Finally, as is the case with Drs. Sullivan and Horne, some of Defendants' aquatic ecology work cannot be completed until Dr. Bierman finishes analyzing Plaintiffs' models:

Finally, as is the case with several of my colleagues, before I can complete my review of Dr. Stevenson's report, I will first need to review Dr. Bierman's conclusions regarding plaintiffs' modeling of the watershed. Dr. Stevenson shows that the aquatic ecology issues are linked to plaintiffs' model, as he relies on Plaintiffs' models in developing his own conclusions. *See, e.g.*, Stevenson Report p. 47. Until Dr. Bierman has identified any inaccuracies or flawed assumptions underlying those models, I cannot fully assess Dr. Stevenson's conclusions relying thereupon.

Assuming diligent work on my part, I believe that I can complete a benthic and aquatic ecology study by May 30, 2009.

Id. ¶¶12-13.

Accordingly, Defendants request that the deadline for the report of their aquatic ecologists be extended to May 30, 2009.

CONCLUSION

As Defendants noted in their opposition to Plaintiffs' March 2008 request for an extension of their expert deadline, Plaintiffs' "case is almost entirely expert driven." Dkt. #1652, at 1. Plaintiffs have spent years on their expert case and have largely concealed their expert work during that period. Accordingly, Plaintiffs have enjoyed an unparalleled ability to slow Defendants' preparations because the "facts" upon which this case will be litigated have been generated in large part by Plaintiffs themselves. Accordingly, Defendants have previously noted that "[u]ntil Defendants receive [Plaintiffs' experts' reports] and conduct discovery into them, Defendants cannot prepare an effective and comprehensive defense." *Id.* Now that the production of Plaintiffs' reports has occurred, Defendants respectfully request sufficient time to prepare a defense that will assist the Court by uncovering any errors in Plaintiffs' expert materials.

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